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No. 75-889

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In the Supreme Court of the United States

OCTOBER TERM, 1975

RUTHE CARBONA,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

JULIUS LUCIUS ECHELES
CAROLYN JAFFE
35 East Wacker Drive
Chicago, Illinois 60601
Attorneys for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Judgments and opinion below 1

Jurisdiction of this Court 2

Constitutional provisions, statutes and rules involved .. 2

Questions presented for review 3

Raising the federal questions 4

Statement of the case 5

Reasons for granting the writ 7

Introduction 7

1. Petitioner was deprived of her constitutional right to fair trial by the jury's exposure to a prosecutor's testimony as to his personal opinion of petitioner's guilt, and by final argument of the trial prosecutor as to his personal opinion that prosecution witnesses told the truth 9

2. Petitioner's constitutional rights were violated when the jury was informed that, after advisement of rights, petitioner declined to give a "homicide statement" 14

3. Petitioner's in-custody statement was admitted in evidence against her in violation of her constitutional rights, where her substantially identical statement, given to the same officer shortly prior thereto, had been suppressed because she had not been warned of her rights as required by *Miranda* v. *Arizona*. The Appellate Court improperly has concluded that petitioner's alleged waiver preceding and accompanying the second statement was constitutionally valid 15

PAGE

4. Petitioner's due process right to a fair trial was abridged by the trial court's refusal to instruct on her theory of the case. The Appellate Court failed to rule upon the constitutional issues raised regarding petitioner's being precluded effectively from presenting her theory of the case—accident or misadventure—to the jury 19

Conclusion 22

Appendix A—Opinion of the Appellate Court .....App. 1

Appendix B—Order of Appellate Court denying petition for rehearing .....App. 37

Appendix C—Order of Illinois Supreme Court denying petition for leave to appeal .....App. 38

AUTHORITIES CITED

Cases

Baker v. United States, 357 F.2d 11 (5 Cir. 1966) 14

Bollenbach v. United States, 326 U.S. 607 (1946) 8

Berger v. United States, 295 U.S. 78 (1935) 12

Chambers v. Mississippi, 410 U.S. 284 (1973) 19, 21

Chapman v. California, 386 U.S. 18 (1967) 7, 13, 14

Cool v. United States, 409 U.S. 100 (1972) 21

Dugan Drug Stores v. United States, 326 F.2d 835 (5 Cir. 1964) 10

Gradsky v. United States, 373 F.2d 706 (5 Cir. 1967) ..10, 11

Greenberg v. United States. 280 F.2d 472 (1 Cir. 1960) 10

Griffin v. California, 380 U.S. 609 (1965) 14

Hall v. United States, 419 F.2d 582 (5 Cir. 1969) 10, 11

PAGE

Harney v. United States, 407 F.2d 586 (5 Cir. 1969) 17

Harrison v. United States, 392 U.S. 219 (1968) 18

Hizel v. Sigler, 430 F.2d 1398 (8 Cir. 1970) 18

Holt v. Virginia, 381 U.S. 131 (1967) 19

Kotteakos v. United States, 328 U.S. 750 (1946) 7, 13

Levine v. United States, 261 F.2d 747 (D.C. Cir. 1958) 20

Miranda v. Arizona, 384 U.S. 436 (1966) 14, 16

Moore v. United States, 401 F.2d 533 (9 Cir. 1968) 16, 18

Morris v. United States, 326 F.2d 192 (9 Cir. 1963) 21

People v. Blissitt, 12 Ill.App.3d 551, 299 N.E.2d 562 (1 Dist. 1973) 9

People v. Mostafa, 5 Ill.App.3d 158, 273 N.E.2d 846 (1 Dist. 1971) 9

South Dakota v. Long, 465 F.2d 65 (8 Cir. 1972) 17

Strauss v. United States, 376 F.2d 416 (5 Cir. 1967) .. 20

Sullins v. United States, 389 F.2d 985 (10 Cir. 1968) .. 16

United States v. Collier, 313 F.2d 157 (7 Cir. 1963) 21

United States v. DeLoach, 504 F.2d 185 (D.C. Cir. 1974) 20

United States v. Goodwin, 492 F.2d 1141 (5 Cir. 1974) 10

United States v. Grimes, 413 F.2d 1376 (7 Cir. 1969) .. 20

United States v. Hale, 419 U.S. 1045 (1975) 14

United States v. Handman, 447 F.2d 853 (7 Cir. 1971) 10, 11

United States v. Jenkins, 440 F.2d 574 (7 Cir. 1971) 16

United States v. Lamerson, 457 F.2d 371 (5 Cir. 1972) 10

PAGE

United States v. Martinez, 487 F.2d 973 (10 Cir. 1973) 11

United States v. Matos, 444 F.2d 1071 (7 Cir. 1971) 14

United States v. Mullings, 364 F.2d 173 (2 Cir. 1966) .. 18

United States v. Nielsen, 392 F.2d 849 (7 Cir. 1968) ..14, 18

United States v. Pierce, 397 F.2d 128 (4 Cir. 1968) 17

United States v. Phillips, 217 F.2d 435 (7 Cir. 1955) 20

United States v. Torrence, 480 F.2d 564 (5 Cir. 1973) .. 21

United States v. Toscano, 166 F.2d 524 (2 Cir. 1948) .. 10

United States v. Tucker, 267 F.2d 212 (3 Cir. 1959) 10

United States ex rel. Doss v. Bensinger, 463 F.2d 576 (7 Cir. 1972) 18

United States ex rel. Williams v. Twomey, 467 F.2d 1248 (7 Cir. 1972) 17

Walker v. United States, 404 F.2d 900 (5 Cir. 1969) 14

Washington v. Texas, 388 U.S. 514 (1967) 19

Westover v. United States (companion case to Miranda v. Arizona), 384 U.S. 436, 494-97 (1966) 17

Other Authorities

United States Constitution, Amendment V 2, 3, 14, 16

United States Constitution, Amendment VI 2, 3, 14, 16

United States Constitution, Amendment XIV (due process) 2, 9, 10, 13, 19, 21

28 U.S.C. 1257(3) 2

U.S. Supreme Court Rule 22 2

Illinois Supreme Court Rule 451(a), Chap. 110A, sec. 451(a), Ill. Rev. Stat. 3, 19, 21

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PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioner, Ruthe Carbona, respectfully prays that a Writ of Certiorari be issued to the Appellate Court of Illinois, First District, to review its decision affirming judgment of conviction in the Circuit Court of Cook County, Illinois, adjudging petitioner guilty of murder.

Judgments and Opinion Below

On April 7, 1975, the Appellate Court of Illinois, First District, First Division, rendered an opinion affirming petitioner's conviction, No. 59299, reported at 27 Ill.App.

3d 988, 327 N.E.2d 546 (1 Dist. 1975). A copy of the Appellate Court's opinion is attached hereto as Appendix A. The Appellate Court denied petitioner's timely petition for rehearing on May 15, 1975. (App. B) A petition for leave to appeal to the Illinois Supreme Court, timely filed, was denied on September 25, 1975, No. 47646. (App. C)

Jurisdiction of this Court

The judgment sought to be reviewed (the Illinois Supreme Court's denial of the petition for leave to appeal) was entered on September 25, 1975. This petition for Writ of Certiorari is filed within 90 days from said denial. Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) and Rule 22 of the Rules of this Court.

Constitutional Provisions, Statutes and Rules Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person . . . shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions the accused shall enjoy the right to a . . . trial by an impartial jury . . . ; . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "Section 1. . . . [N]or shall any State deprive any person of . . . liberty . . . , without due process of law; . . "

Illinois Supreme Court Rule 451(a), Chap. 110A, sec. 451(a), Ill. Rev. Stat., provides, in pertinent part, as follows:

> "(a) Use of IPI-Criminal Instructions; Requirements of Other Instructions. Whenever Illinois Pattern Instructions in Criminal Cases (IPI-Criminal) contains an instruction applicable in a criminal case, giving due consideration to the facts and the governing law, and the court determines that the jury should be instructed on the subject, the IPI-Criminal instruction shall be used, unless the court determines that it does not accurately state the law. Whenever IPI-Criminal does not contain an instruction on a subject on which the court determines that the jury should be instructed, the instruction given on that subject should be simple, brief, impartial, and free from argument."

Questions Presented for Review

1. Was petitioner deprived of her constitutional right to a fair trial when the prosecution presented the testimony of the investigating prosecutor that he recommended that a murder charge be placed against petitioner, thereby advising the jury of his opinion as to petitioner's guilt, and when the trial prosecutor, in closing argument, personally vouched for the credibility of the State's witnesses?

2. Were petitioner's Fifth Amendment and due process rights violated when the jury was informed that, after advisement of rights, petitioner declined to give a "homicide statement"?

3. Is the decision of the trial and Appellate courts herein—that petitioner waived her Fifth and Sixth Amendment rights prior to giving a statement which was

used against her at trial—contrary to controlling constitutional principles concerning the standards applicable for determining whether an alleged waiver of constitutional rights is knowingly and understandingly made, upon the facts herein, where:

> The statement which the court refused to suppress had been preceded by a substantially identical statement which the court had suppressed, and both were given to the same officer while petitioner was in his continuous custody; and
>
> The evidence also demonstrated that petitioner was hysterical, ingested tranquilizers, and was not specifically asked whether she understood the rights of which she had been advised prior to giving the second statement?

4. Was petitioner deprived of her due process right to a fair trial when the court refused to instruct the jury as to her theory of the case—accident or misadventure—when there was evidence supportive of such theory?

5. Did the State reviewing court's manner of resolving each of the above issues (Questions 1 through 4) comport with this Court's pronouncements concerning the applicable criteria for assessing constitutional error, where the Illinois Appellate Court did not state that it found each asserted error to be harmless beyond a reasonable doubt?

Raising the Federal Questions

Petitioner raised each of the within issues in the trial court. That court denied her motion to suppress her statements; overruled objections and motion for mistrial directed to former Asst. State's Attorney Lindmark's testimony that he recommended that murder charges be filed; refused to instruct the jury on the defense theory of accident; overruled objections to Lindmark's testimony that

after advisement of her rights, petitioner declined to give him a homicide statement; and overruled defense objections to, and a motion for mistrial based upon, the prosecution's closing argument. Each of these issues was further presented to the trial court by way of petitioner's post-trial motion for new trial, which the court denied. Each of the constitutional issues presented herein was fully briefed and argued in the Appellate Court and submitted to the Illinois Supreme Court in the petition for leave to appeal.

Further, petitioner urged in her petition for rehearing to the Illinois Appellate Court and in her petition for leave to appeal to the Illinois Supreme Court that the Appellate Court had failed properly to consider the within issues on their constitutional merits, but rather, had concluded the constitutional errors as "harmless" based upon its perception of the evidence as having been sufficient to sustain conviction, in violation of constitutional standards as set forth by this Court.

Statement of the Case

Petitioner was indicted (No. 72-1024) for murder. (A. 1) [1] Count 1 alleged that on Dec. 22, 1971, she intentionally shot and killed [her husband] Joseph Carbona, without legal justification (A. 1); count 2 alleged that she shot him knowing that this created a strong probability of his death (A. 2). While not relying on self-defense or manslaughter to justify or mitigate any homicide, (A. 28), petitioner's theory was that following an affray during which the deceased threatened her and struck her with

[1] "R." refers to the Common Law Record, contained as the first portion of Volume 1 of the Record on Appeal, "A" refers to Petitioner's Abstract filed in the Appellate Court.

a cocked 357 Magnum and intentionally backed an automobile into her in the family's driveway, she attempted to prevent him from leaving their abode with his belongings; when he was descending the stairs from the second floor to the first, with clothing over one arm and the cocked Magnum still in his hand, she tugged at his arm, and he somehow tripped, the gun went off, and he fell to the bottom of the stairs—in other words, that Joseph Carbona met his death through accident or misadventure. (A. 28)

The jury found petitioner guilty upon count 2, (A. 2), and the court declared a mistrial as to count 1, then nolled by the State. (A. 2) Petitioner's motions for a new trial (A. 2) and in arrest of judgment (A. 2) were denied. (A. 2) After a presentence investigation (R. 103-04, A. 2) disclosing no prior criminal record, the court sentenced petitioner to 20-60 years imprisonment. (A. 3)

Specific facts necessary for an understanding of each Point raised in this petition are set forth within the respective Points and are not repeated herein to avoid unnecessary duplication.

REASONS FOR GRANTING THE WRIT

Introduction

In its opinion affirming petitioner's conviction, the Appellate Court has failed to give due and proper consideration to the constitutional issues raised in her appeal, as set forth in this Petition, and, moreover, appears improperly to have concluded certain errors as "harmless" based solely upon its perception of the evidence as having been sufficient to sustain the conviction.[2] Moreover, errors of constitutional magnitude have been deemed not to require reversal although the Appellate Court has not declared, beyond a reasonable doubt—as is required by applicable United States Supreme Court decisions—that such errors could not have contributed to the conviction. *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

Even if the evidence may be deemed legally sufficient, it was not so overwhelming that the jury could not reasonably have reached the opposite result, but for the serious prejudicial errors of constitutional magnitude complained of herein. Moreover, while "The jury was not required to search out potential explanations compatible with innocence, and elevate them to a status of reasonable doubt," (App. A, p. 17), this Court must recognize that

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[2]Assuming, *arguendo*, that the evidence was legally sufficient to support conviction, petitioner maintains that the constitutional errors urged herein—individually or collectively—may have contributed to the conviction and thus require reversal. For even if the evidence was, technically speaking, "legally sufficient," the serious, substantive errors herein complained of may well have induced the jury to convict. See *Kottakos* v. *United States*, 328 U.S. 750, 763-65 (1946).

such explanations were indeed available and might have caused one or more jurors to entertain a legitimate, reasonable doubt precluding conviction, had it not been for the infecting presence of serious, prejudicial errors of constitutional proportions. This Court should not—as the Appellate Court has done in the case at bar—give controlling emphasis to its own view of the evidence as having been legally sufficient. In the inimitable language of Mr. Justice Frankfurter, speaking for the Court:

> "In view of the Government's insistence that there is abundant evidence to indicate that . . . [defendant was guilty], it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials . . . .
>
> ". . . All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. . . . From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." *Bollenbach* v. *United States,* 326 U.S. 607, 614 (1946).

We respectfully urge that these concepts should have—but in fact, unfortunately, did not—govern the Appellate Court's consideration of petitioner's appeal. We submit that they should now control consideration of this Petition for Certiorari, and, upon appropriate consideration,

that Certiorari should be allowed, and petitioner's conviction be reversed, or reversed and remanded.

* * *

1.

Petitioner was deprived of her constitutional right to a fair trial by the jury's exposure to the testimony of a prosecutor, as to his personal opinion of petitioner's guilt, and by final argument of the trial prosecutor as to his personal opinion that prosecution witnesses told the truth.

Former Assistant State's Attorney James Lindmark was permitted to testify that, in his then official capacity, following his investigation and interview with petitioner, he recommended that a charge of murder be placed against petitioner. (A. 15)

This violated petitioner's right to a fair trial, as has explicitly been held in *People* v. *Blissitt*, 12 Ill.App.3d 551, 299 N.E.2d 562 (1 Dist. 1973), which the Appellate Court inapplicable.[3]

This Court has not yet had occasion to rule on the precase issue; granting certiorari herein would present an ideal opportunity for the Court to speak on the constitutional issue whether such prosecutorial opinion testimony may be admitted consistent with due process of law.

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[3] While the Appellate Court indicates that the issue might have been considered waived for failure properly to make timely objection below on the grounds now asserted, (App. A, pp. 26-27), it nonetheless has reached and decided the issue on the merits.

Moreover, it should be noted that *People* v. *Blissitt*, *supra*, was decided on June 21, 1973, while trial in the case at bar commenced on April 24, 1973, thus explaining counsel's failure specifically to raise such issue at trial. While grounded upon constitutional principles of fair trial, *Blissitt* was a case of first impression in Illinois on the precise issue regarding a prosecutor's recommendation of what charge to file. See also *People* v. *Mostafa*, 5 Ill.App.3d 158, 274 N.E.2d 846 (1 Dist. 1971).

The error of presenting to the jury the personal opinion of the former prosecutor was aggravated when the trial prosecutor argued to the jury that they should rely on his personal opinion that the State's witnesses were truthful. *The prosecutor actually told the jury that he wouldn't "lay his law license on the line" if he did not believe that the prosecution witnesses were truthful.* (A. 31) It is hard to imagine a clearer way of conveying to the jury, not only the prosecutor's personal belief in his witness' veracity, but also that personally, based upon his own integrity, he vouched for their credibility.

Yet the Appellate Court found the argument justified by the doctrine of invited reply. (App. A, p. 32) This theory cannot be utilized where its application results—as here—in denial of due process.[4]

The argument in the instant case is identical in effect to that condemned in such cases as *United States* v. *Lamerson*, 457 F.2d 371 (5 Cir. 1972); *Greenberg* v. *United States*, 280 F.2d 472 (1 Cir. 1960); *Gradsky* v. *United States*, 373 F.2d 706 (5 Cir. 1967); *Hall* v. *United States*, 419 F.2d 582 (5 Cir. 1969); and *United States* v. *Handman*, 447 F.2d 853 (7 Cir. 1971).

In *Greenberg* v. *United States*, *supra*, 280 F.2d at 474-75, the court stated:

> "Rule 15 of the Canons of Professional Ethics of the American Bar Association reads,

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[4] Cases reversing for prejudicial prosecution argument and conduct depriving defendant of a fair trial, despite defense provocation thereof, include: *United States* v. *Toscano*, 166 F.2d 524, 526-27 (2 Cir. 1948); *United States* v. *Goodwin*, 492 F.2d 1141, 1147-48 (5 Cir. 1974); *United States* v. *Tucker*, 267 F.2d 212, 214-15 (3 Cir. 1959); *United States* v. *Handman*, 447 F.2d 853, 856 (7 Cir. 1971); *Dugan Drug Stores* v. *United States*, 362 F.2d 835 (5 Cir. 1964).

> 'It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause'
>
> * * * To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage of official backings. The resolution of question of credibility of testimony is for impartial jurors and judges. The fact that government counsel is, as he says, an advocate is the very reason why he should not impinge upon his quasi-judicial function. We believe the cannon to be elemental and fundamental."

Accord, Hall v. *United States,* 419 F.2d 582, 586-87 (5 Cir. 1969); *United States* v. *Handman,* 447 F.2d 853 (7 Cir. 1971). See also *United States* v. *Martinez,* 487 F.2d 973, 977 (10 Cir. 1973):

> "[W]e caution prosecuting attorneys that in their closing argument they should not, in an effort to bolster the credibility of a government witness, place their own integrity, directly or indirectly, on the scales. Such is improper . . ."

In *Gradsky* v. *United States,* 373 F.2d 706 (5 Cir. 1967), the court stated:

> "During the argument, the Assistant United States Attorney said:
>
> > 'We offered you Zane and Gilmore, *and when we offer a witness we have to vouch for his credibility. Vouching for his credibility involves some feeling that the man is telling the truth,* . . . (Emphasis added), by the people, and for the people, and that *the government representatives don't put a witness on the stand unless there ap-*

> *pears to be some credibility, until he appears to be a truthful witness. . .'* (Emphasis in original.)

As this court has indictaed in McMillian v. United States, 5 Cir., 363 F.2d 165, it is dangerous business for the prosecuting officer to state to the jury that the United States government vouches for the honesty or veracity of its witnesses. In that case, we cited from Dunn v. United States, 5 Cir., 307 F.2d 883, where, at page 885, we said:

> 'It is improper for counsel to express his personal opinion or to state facts of his own knowledge not in evidence, and not a part of the evidence to be presented.'

We then stated the test that should be applied to such a case:

> 'The inquiry should be whether the prosecutor's expression might reasonably lead the jury to believe that there is *other evidence, unknown or unavailable to the jury, on which the prosecutor was convinced of the accused's guilt.* 363 F.2d at 169.'' 373 F.2d at 709-10. (Emphasis added.)

These decisions are an outgrowth of this Court's pronouncement in *Berger* v. *United States,* 295 U.S. 78, 88 (1935), where this Court stated:

> ''The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor —indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods

> calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

Here, the assertion by the prosecutor of his personal belief in the integrity of the State's witnesses, coupled with the earlier testimony of the former prosecutor that he recommended that murder charges be filed, deprived petitioner of a constitutionally fair trial in accordance with due process of law.

It is impossible for this Court to state beyond a reasonable doubt that the constitutional error of permitting the jury to hear Lindmark's testimony as to his recommendation of murder charges and the trial prosecutor's argument personally vouching for the credibility of the State's witnesses could not have contributed to the jury's verdict, particularly when such error is considered, not in a vacuum, but together with the other errors of constitutional magnitude claimed in this Petition. *Chapman* v. *California*, 386 U.S. 18, 24 (1967).[5] See also *Kotteakos* v. *United States*, 328 U.S. 750, 763-65 (1946).

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[5] Each of the issues discussed in this Petition for Certiorari is of constitutional proportion, and the same argument—that is, that this Court cannot, and the Illinois Appellate Court did not, declare a belief beyond a reasonable doubt that such error, considered alone or cumulatively, could not have contributed to the verdict, and therefore, that the error may not be deemed "harmless"—applies to each such claim of error. For the sake of brevity, such argument is hereby incorporated by reference into each of the following Points without specifically being noted therein.

2.

Petitioner's constitutional rights were violated when the jury was informed that, after advisement of rights, petitioner declined to give a "homicide statement."

The jury, already aware that petitioner had been advised of her rights, (A. 9), was advised by former Asst. State's Attorney Lindmark that she declined to give him a "homicide statement." (A. 15) This is error.[6]

This Court has stated:

> "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." *Miranda* v. *Arizona*, 384 U.S. 436, 468 n.37 (1966).

This position has been reaffirmed in *United States* v. *Hale*, 419 U.S. 1045 (1975).

The holding of the Appellate Court rationalizes the propriety of such testimony herein by stating that since petitioner in fact did not remain silent and the jury was aware of this, her "Fifth Amendment right to be free from self-incrimination is not in issue." (App. A, p. 28)

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[6] Reviewing courts consistently have held that this proscription against commenting upon a defendant's invocation of Fifth and Sixth Amendment rights is violated by presenting to the jury evidence that a defendant, after being warned of his constitutional rights as required by *Miranda* v. *Arizona*, *supra*, elected to remain silent. See, *e.g.*, *Baker* v. *United States*, 357 F.2d 11, 13 (5 Cir. 1966); *Walker* v. *United States*, 404 F.2d 900, 902-03 (5 Cir. 1969); *United States* v. *Nielsen*, 392 F. 2d 849, 852 (7 Cir. 1968); *United States* v. *Matos*, 444 F.2d 101 (7 Cir. 1971). This result is mandated by such cases as *Chapman* v. *California*, 386 U.S. 18 (1967), and *Griffin* v. *California*, 380 U.S. 609 (1965).

However, that petitioner indeed did make certain statements, intended as exculpatory, during conversations both with Lindmark and with investigating police officers, cannot detract from the error of informing the jury that she refused to make a *formal "homicide statement"* denominated as such.

This Court in *Miranda* held that a citizen has a right to stop talking to the authorities at any time. *Id.* at 473-74. And since it is prejudicial error to advise a jury that a suspect refused to answer at all, it is equally prejudicial to advise a jury that a person who commenced to answer certain questions, refused to answer others, *i.e.,* declined to give a "homicide statement."

3.

Petitioner's in-custody statement was admitted in evidence against her in violation of her constitutional rights, where her substantially identical statement, given to the same officer shortly prior thereto, had been suppressed because she had not been warned of her rights as required by Miranda v. Arizona.* The Appellate Court improperly has concluded that petitioner's alleged waiver preceding and accompanying the second statement was constitutionally valid.

In deciding this issue against petitioner, the Appellate Court has held that the trial court's determination that she knowingly and voluntarily waived her rights was not against the manifest weight of the evidence. (App. A, pp. 17-18) We urge this Court carefully to consider the evidence

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* Petitioner's initial statement to officer Marinelli was suppressed by the trial court on defense motion. (A. 8-9; See App. A, pp. 5, 18)

concerning the asserted waiver,[7] and then to consider whether finding waiver based upon such evidence was constitutionally erroneous as a matter of law and whether in fact such evidence could satisfactorily establish that knowing and intelligent waiver requisite to a valid finding that constitutional rights have indeed been waived.[8] We submit that no valid waiver of petitioner's Fifth and Sixth Amendment rights can properly be found.

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[7] Although Officer Marinelli testified at the hearing on the motion to suppress the statement given at the police station petitioner "indicated" that she understood her rights, (A. 4), he did not specifically testify that he asked her whether she understood them, and had failed to include anything concerning petitioner's understanding of her rights in his testimony at the preliminary hearing. (A. 4) This casts grave doubt on his later testimony at trial; so much so, we suggest, that the trial and appellate courts improperly found that petitioner understood her rights. Petitioner was hysterical and crying, (A. 5-6, 10); she had to be given tranquilizers, (A. 21); she was in custody with no one present but Marinelli and Policewoman Duffy when this statement was taken from her. (A. 4) And although Officer Marinelli testified that petitioner "indicated" that she understood her rights, (A. 4), he did not clarify the manner in which she purportedly so "indicated," nor did he testify that he specifically asked her whether she understood her rights.

[8] This evidence, see fn. 6, *supra*, can not suffice to meet the State's heavy constitutional burden of showing knowing and intelligent waiver. *Miranda* v. *Arizona*, 384 U.S. 436, 475 (1966):

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. . . .
>
> "[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."

See also *Moore* v. *United States*, 401 F.2d 533, 534 (9 Cir. 1968); *Sullins* v. *United States*, 389 F.2d 985, 988 (10 Cir. 1968); *United States* v. *Jenkins*, 440 F.2d 574 (7 Cir. 1971).

Moreover, even if the "fruit of the poisonous tree" argument cannot independently be considered as a separate ground for excluding the second statement because such argument was not specifically raised below, (see App. A, p. 18), at the very least this Court should consider, as a factor in determining the constitutional sufficiency of the evidence to establish waiver as to the second statement, the fact that the prior, suppressed statement, given without proper warnings, had been made shortly before the second statement.[9]

In addition to the factors concerning "harmless error" which are applicable to the other Points raised herein,[10]

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[9] Petitioner's second statement was made to the same officer as the first, about an hour and a half after the first. She was continuously in custody. (A. 8-9)

Although at the initial hearing on petitioner's motion to suppress the "second" statement there was no awareness of record of the existence of the "first," when later it became evident that a prior statement had been taken from defendant by the same officer at a time when *Miranda* warnings were not, but should have been given, the second statement should have been suppressed as a product of the first, unconstitutionally obtained statement. *Westover* v. *United States* (companion case to *Miranda* v. *Arizona*), 384 U.S. 436, 494-97 (1966). See also *South Dakota* v. *Long*, 465 F.2d 65, 70 (8 Cir. 1972); *United States* v. *Pierce*, 397 F.2d 128, 131 (4 Cir. 1968); *United States ex rel. Williams* v. *Twomey*, 467 F.2d 1248, 1252 (7 Cir. 1972); *Harney* v. *United States*, 407 F.2d 586 (5 Cir. 1969).

Because petitioner's second statement was not shown to have been independent of the initial, improperly obtained statement, and nothing intervened to "purge the taint," the second statement should have been suppressed as a tainted fruit of the first.

Alternatively, that it was made to the same officer shortly after the first must be taken into consideration in determining the validity of petitioner's alleged "waiver" of her rights as to the second statement.

[10] See footnote 5, p. 13, *supra*, and accompanying text.

special considerations factually apposite to the instant Point militating against a finding that the error here was "harmless" are set forth below.[11]

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[11] Petitioner's decision to take the stand was based upon the court's having overruled the motion to suppress her in-custody statement; she thus opened herself up to scathing cross-examination and opened the door to prejudicial rebuttal evidence being presented by the State. Had her statement been excluded, as it should have been, petitioner would not have taken the stand and these other adverse consequences would not have flowed therefrom.

Moreover, the court's refusal to instruct upon the law applicable in a purely circumstantial case (see App. A, p. 34) was no doubt based upon its regard of petitioner's "statement" as "direct evidence" so as to remove the case from the otherwise applicable circumstantial evidence rule. And the Appellate Court ruled that testimony as to admissions allegedly made by petitioner rendered refusal of the requested instruction proper, (App. A, p. 34); this evidence came from rebuttal witnesses who could not have been called, had petitioner not taken the stand.

And most importantly, had the statement been excluded, it is extremely doubtful that petitioner could have been convicted; for without the statement, there would have been no competent evidence implicating her at all.

See *United States ex rel. Doss* v. *Bensinger*, 463 F.2d 576, 578 (7 Cir. 1972); *Moore* v. *United States*, 401 F.2d 533, 534 (9 Cir. 1968).

And it is no answer to say that petitioner waived the right to raise this argument on appeal by taking the stand and testifying to the substance of that second statement; for without proof that the testimony was not induced by wrongful admission of her statement, her testimony was as much a fruit and a product of that statement as that statement was of the initial, suppressed one. *Harrison* v. *United States*, 392 U.S. 219 (1968). *Cf. United States* v. *Mullings*, 364 F.2d 173, 175 (2 Cir. 1966) (prosecution evidence refuting contents of defendant's improperly admitted statement should not have been allowed); *United States* v. *Nielsen*, 392 F.2d 849, 853 n.3 (7 Cir. 1968) (where statements inadmissible, instructions regarding them were also improper).

Moreover, taking the stand to explain statements already admitted in evidence is not equivalent to waiver of the question of the admissibility of the statements. *Hizel* v. *Sigler*, 430 F.2d 1398, 1402 (8 Cir. 1970).

4.

Petitioner's due process right to a fair trial was abridged by the trial court's refusal to instruct on her theory of the case. The Appellate Court failed to rule upon the constitutional issues raised regarding petitioner's being precluded effectively from presenting her theory of the case—accident or misadventure—to the jury.

While purporting to rule upon the issues presented by petitioner's argument concerning improperly given and refused jury instructions, the Appellate Court specifically has failed to give any consideration to the constitutional issues raised by petitioner's argument. (App. A, pp. 35-36)

A defendant in State criminal proceedings has a due process right to present defense evidence. *Washington* v. *Texas,* 388 U.S. 514 (1967); *Chambers* v. *Mississippi,* 410 U.S. 284, 302 (1973). Inherent therein is the right to raise relevant issues. *Holt* v. *Virginia,* 381 U.S. 131, 136 (1967). And inherent in the right to raise an issue is the concomitant right to have the jury properly instructed thereon, see cases cited at p. 20, *infra.* This Court has not yet had occasion to rule on this important question of federal constitutional law.

The trial court refused to instruct pursuant to petitioner's theory of the case, that is, that if the shooting occurred because of accident or misadventure, petitioner should be acquitted; and that one of the matters which the State must establish to prove its case against petitioner was that the killing was *not* the result of accident or misadventure. While the court initially indicated it would instruct pursuant to petitioner's requested instructions, (D. 6 & 7, A. 28), instead the court gave only the State's "issues" instruction, (No. 13, IPI 7.02),[12] which

[12] "IPI" refers to the Illinois Pattern Jury Instructions in Criminal Cases, adopted for use in Illinois by Supreme Court Rule. See Supreme Court Rule 451(a), Chap. 110A, sec 451(a), Ill. Rev. Stat.

makes no mention of the State having any burden to establish that decedent's death was not an accident.

Clearly, if the deceased met his death through accident or misadventure resulting from his holding a cocked and loaded gun, petitioner was not criminally culpable.

Where a defendant presents a theory supported by any evidence, he has a right to have the jury instructed upon the law applicable thereto, and very slight evidence upon a given defense theory—even if only the defendant's own testimony—requires the giving of relevant instructions. *United States* v. *Grimes,* 413 F.2d 1376 (7 Cir. 1969);[13] *Levine* v. *United States,* 261 F.2d 747 (D.C. Cir. 1958); *United States* v. *Phillips,* 217 F.2d 435, 440-41 (7 Cir. 1955); see also *Strauss* v. *United States,* 376 F.2d 416, 419 (5 Cir. 1967), and cases cited therein. *Cf. United States* v. *DeLoach,* 504 F.2d 185, 189 (D.C. Cir. 1974).[14]

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[13] In *Grimes, supra,* defendant unsuccessfully sought to have the jury instructed on his theory of the case—*i.e.*, that his alleged assult on a prison guard was justified in that he was coming to the defense of another—as to which his own testimony was the only evidence. The reviewing court reversed, holding:

> "[D]efendant in a criminal case is entitled to have the jury consider any theory of the defense which is supported by law and which has some foundation in the evidence, however tenuous." 413 F.2d at 1378.

[14] The court in *DeLoach, supra,* recognized a defendant's constitutional "right to have his theory of the case argued vigorously to the jury." 504 F.2d at 189. And of course, argument unsupported by instructions of the court may be worse than no argument at all:

> "An argument to a jury, however, on a legal issue, unsupported by instruction to which the defendant was entitled, constitutes an aggravation rather than a mitigation of the harmful effect of the court's refusal to instruct." *United States* v. *Phillips,* 217 F.2d 435, 440 (7 Cir. 1955).

Here, petitioner testified that the homicide resulted from accident or misadventure. (A. 18-21) The requested instructions, or other adequate instructions by the court on the subject, should have been given. The court's failure to instruct on the subject at all violated petitioner's due process rights.

Moreover, since here, the improperly omitted instructions (D. Insts. 6 & 7, A. 28) clarified the question of the State's burden of proof regarding the defense of accident, and no instructions which were given discussed such burden, the jury may well have improperly considered that petitioner bore the burden of proving that the shooting was in fact an accident. Any such shifting of the burden of proof is constitutionally impermissible. *Cool* v. *United States,* 409 U.S. 100 (1972).

Despite the outward conformity of the instructions given to the IPI pattern instructions, the instructions to be given in any particular case must be governed by its individual factual posture. Moreover, where—as here—no IPI instruction is applicable, a non-IPI instruction clearly should have been given. See Supreme Court Rule 451(a), chap. 110A, sec. 451(a), Ill. Rev. Stat.

And where, as here, the IPI-approved instructions given did *not* adequately inform the jury of the elements involved in the defense of accident, and did *not* inform them *at all* concerning the State's burden of proof as to this defense, constitutional considerations must take precedence over State procedural rules.

To the extent that application of Supreme Court Rule 451(a) in Illinois discourages trial judges from giving non-pattern instructions to a defendant's constitutional detriment where no pattern instructions cover the subject, constitutional considerations must take precedence over the State procedural rule. *Chambers* v. *Mississippi,* 410 U.S. 284 (1973).

Moreover, instructions can be erroneous, requiring reversal, because under the facts of a particular case they are inadequate—as here—even though in a vacuum they may correctly state abstract principles of law. See, *e.g.*, *United States* v. *Collier*, 313 F.2d 157, 159 (7 Cir. 1963); *Morris* v. *United States*, 326 F.2d 192, 194-95 (9 Cir. 1963); *United States* v. *Torrence*, 480 F.2d 564, 565 (5 Cir. 1973). In each case the reviewing court reversed for precisely this reason.

Conclusion

For any or all of the foregoing reasons, petitioner requests that this Court issue a Writ of Certiorari to review the judgment of the Illinois Appellate Court, First District.

Respectfully submitted,

JULIUS LUCIUS ECHELES
CAROLYN JAFFE
Attorneys for Petitioner.